AN EARLY REPORT ON BENEFIT REPORTS

J. Haskell Murray∗

∗ J. Haskell Murray is an Assistant Professor of Management and Business Law at Belmont University. The Author thanks Dana Brakman Reiser (Brooklyn Law School), Cass Brewer (Georgia State University College of Law), Joan Heminway (The University of Tennessee College of Law), Alicia Plerhoples (Georgetown University Law Center), and the participants of the 2015 University of Connecticut Social Enterprise and Entrepreneurship Conference for their comments on this Article or their thoughts on the topic. Corey Wright provided valuable research assistance. The opinions expressed and any errors made are solely those of the Author.

ABSTRACT

Benefit corporation proponents argue that the new social enterprise entity form "meets higher standards of corporate purpose, accountability, and transparency." This Article analyzes the transparency claim by examining hand-collected benefit report data and the substantive statutory reporting requirements. Data from early benefit corporations shows an abysmal benefit report compliance rate (below ten percent), drawing into question the claims about heightened transparency. This Article also provides reasons to doubt the efficacy of the current substantive reporting requirements due to the lack of specificity and lack of effective enforcement mechanisms in most states' benefit corporation statutes. This Article explains how policy, theory, and now early data, all point to significant deficiencies in the benefit reporting framework. Finally, this Article concludes with suggestions to strengthen the benefit corporation reporting requirements, increase compliance rates, and encourage benefit corporation transparency.

I. INTRODUCTION

Benefit corporation proponents argue that the new social enterprise entity form "meets higher standards of corporate purpose, accountability, and transparency."[1] This Article analyzes the transparency claim by examining hand-collected benefit report data and the substantive statutory reporting requirements. Data from early benefit corporations shows an abysmal benefit report compliance rate (below ten percent), drawing into question the claims about heightened transparency. This Article also provides reasons to doubt the efficacy of the current substantive reporting requirements due to the lack of specificity and lack of effective enforcement mechanisms in most states' benefit corporation statutes. This Article explains how policy, theory, and now early data, all point to significant deficiencies in the benefit reporting framework. Finally, this Article concludes with suggestions to strengthen the benefit corporation reporting requirements, increase compliance rates, and encourage benefit corporation transparency.

Part II of this Article provides an overview of the social enterprise forms in the United States and the early academic literature in this area. Part III unpacks the hand-collected data on benefit reports that is the cornerstone of this Article. Part IV examines the mandatory disclosure literature, describes the current state of benefit corporation reporting—including the noncompliance problem and the weakness of the substantive reporting requirement—and provides suggestions to improve future compliance rates and usefulness of the benefit reports. This Article concludes with a summary of the Article's primary arguments and makes suggestions for future research.

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1 Yusi Wang Turell, *B-Corps Provide Purpose and Profit*, BUS. NH MAG. (Apr. 7, 2014), http://millyardcommunications.com /index.php?src=news&refno=4404&category=News.

II. SOCIAL ENTERPRISE HISTORY AND OVERVIEW OF BENEFIT CORPORATION LAW

A. *Social Enterprise Law in the United States*

Currently, social enterprise law in the United States involves for-profit companies that pursue a public purpose.[2] Social enterprise statutes appear to have evolved, at least in part, from constituency statutes. While most state constituency statutes are permissive and simply allow consideration of various stakeholders, most social enterprise statutes are mandatory and require consideration of stakeholders beyond merely shareholders.[3] Vermont passed the first U.S. social enterprise statute in 2008, allowing for the formation of "low-profit, limited liability companies" ("L3C").[4] Additional social enterprise statutes followed, allowing the formation of benefit corporations, benefit LLCs, flexible purpose corporations, general benefit corporations, public benefit corporations, social purpose corporations, specific benefit corporations, and sustainable business corporations.[5] These social enterprise forms can be

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[2] Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 62–63 (2010) (stating that "social enterprises" can be for-profit or non-profit entities but noting that the current U.S. statutes are focused on for-profit social enterprises).

[3] VT. STAT. ANN. tit. 11, § 3001(27)(A) (2015) (the Vermont L3C statute, on which most of the L3C state statutes are based, requiring that the L3C "significantly furthers the accomplishment of one or more charitable or educational purposes" and requiring that the L3C "would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes"); MODEL BENEFIT CORP. LEGIS. §§ 102, 301(a) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf (defining a benefit corporation's general public benefit purpose as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation" and requiring consideration of various corporate stakeholders); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*., 25 REGENT U. L. REV. 269, 289 (2013) (noting that benefit corporation laws mandate the consideration of stakeholder interests, while traditional corporate law merely allows it); Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 243 (2014) (contrasting the Delaware version of the benefit corporation statute, called a "public benefit corporation" statute, with constituency statutes and noting that constituency statutes are permissive, while the Delaware public benefit corporation statute mandates balancing the interests of various corporate constituencies); John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 128 (2010) (stating that the L3C statutes mandate operation of the entity primarily to further charitable ends).

[4] VT. STAT. ANN. tit. 11, § 3001(27)(A) (2015); John A. Pearce II & Jamie P. Hopkins, *Regulation of L^3Cs for Social Entrepreneurship: A Prerequisite to Increased Utilization*, 92 NEB. L. REV. 259, 260 (2013).

[5] Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 402 (2014) (discussing the benefit LLC form); Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 30–31 (2014) (discussing Minnesota's general benefit corporation and specific benefit corporation forms); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit*

condensed into three basic types: benefit entities, L3Cs, and social purpose corporations. Each of these forms has been discussed more extensively in other academic articles by this Author and others.[6]

To date, eight states have an L3C statute and two states have a social purpose corporation statute.[7] The L3C was initially designed to target program related investments from foundations and, among the social enterprise statutes in the United States, the L3C statutes are the clearest in their prioritizing of social purpose over financial profits. The two social purpose corporation statutes, previously called the flexible purpose corporation statute in California, were passed to provide more freedom to managers by allowing a more narrow social purpose than is permissible under some other social enterprise statutes.[8] The benefit corporation form has emerged as the most popular social enterprise statute type, with over two dozen states enacting some sort of benefit corporation statute.[9] The following sections provide an overview of the benefit corporation law and examine in more detail the benefit report requirements, which are the focus of this Article.[10]

Corporation Law, 4 HARV. BUS. L. REV. 345, 347–64 (2014) [hereinafter Murray, *Social Enterprise Innovation*] (comparing the benefit corporation and public benefit corporation laws); Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 681–82 (2013) (listing many of the social enterprise entity forms and noting that the proliferation is likely to continue).

6 *See, e.g.*, Katz & Page, *supra* note 2, at 62–63; Murray, *Social Enterprise Innovation*, *supra* note 5.

7 Reiser, *supra* note 5, at 689 n.31 (stating that Washington and California are the only two states to pass social purpose corporation and flexible purpose corporation statutes); *Here's the Latest L3C Tally*, INTERSECTOR PARTNERS, L^{3}C, http://www.intersectorl3c.com/l3c_tally.html (last visited Oct. 8, 2015); Alicia Plerhoples, *Flexible Purpose Corporations Change Their Name*, SOCENTLAW.COM (Oct. 20, 2014), http://socentlaw.com/2014/10/flexible-purpose-corporations-change-their-name/ (stating that California's flexible purpose corporation statute was renamed as a "social purpose corporation" statute, effective January 1, 2015, to match Washington state's name for its similar statute).

8 Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 57–60 (2012) (describing the increased flexibility of the social purpose corporation statutes as compared to the benefit corporation statutes).

9 *State by State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status (last visited Oct. 8, 2015). As of October 8, 2015, 30 states and the District of Columbia had passed some form of benefit corporation statute. *Id.* The benefit corporation umbrella extends to cover statutes allowing for the formation of benefit corporations, public benefit corporations, sustainable business corporations, general benefit corporations, and specific corporations. Benefit LLC statutes are built on an LLC base, not a corporate base, but the benefit LLC statutes also largely follow the benefit corporation principles. The primary distinguishing characteristic of benefit corporation laws is that they require a general public benefit purpose and mandate the consideration or balancing of the interests of various corporate stakeholders.

10 *See infra* Part II.B–C.

B. Benefit Corporation Law in General

Benefit corporation statutes require directors to consider the interests of a multitude of corporate stakeholders, while pursuing a general public benefit purpose. Benefit corporation proponents claim that the market is demanding social enterprise laws and that the traditional legal frameworks are insufficient for social entrepreneurs.[11] According to proponents, a benefit corporation "meets higher standards of corporate purpose, accountability, and transparency."[12] Each of these three claims deserves separate, critical attention. First, the higher standard of corporate purpose claim is tied to the statutory requirement that benefit corporations have a "general public benefit purpose" to make "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[13] Second, the "greater accountability" claim is tied to the statutory provisions that (1) require the directors to consider various groups of corporate stakeholders in their decisions, including shareholders, employees, customers, the community, and the environment; (2) mandate the firm be measured against a third-party standard; and (3) provide for the bringing of benefit enforcement lawsuit for statutory violations.[14] Finally, the "greater transparency" claim is primarily tied to the benefit reporting requirements.[15] While all three claims can be seriously questioned, this Article focuses on the

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11 WILLIAM H. CLARK JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC (2013), http://benefitcorp.net/sites/default/files/documents/Benefit%20Corporation%20White%20Paper.pdf (last visited Oct. 8, 2015) [hereinafter PROPONENT WHITE PAPER].

12 *What Is a Benefit Corporation?*, BENEFIT CORP., http://benefitcorp.net/businesses (last visited Oct. 8, 2015).

13 MODEL BENEFIT CORP. LEGIS. § 102 (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.; *see* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 839–42 (2012) (calling the benefit corporation approach to corporate purpose a "holistic approach [that] is meant to be both comprehensive and flexible"). *But see* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1036 (2013) (calling the benefit corporation law both too broad and too narrow because it does not allow deviation from the general public benefit purpose).

14 PROPONENT WHITE PAPER, *supra* note 11, at 17; MODEL BENEFIT CORP. LEGIS. §§ 301(a), 305. Directors and officers of benefit corporations are not subject to monetary liability, however, for any failure to pursue or create a general public benefit. *Id.* §§ 302(e), 303(c). Further, of all the stakeholders that must be considered by benefit corporation directors, only shareholders have statutorily granted standing to bring a benefit enforcement proceeding. *Id.* § 305(c). In the current version of the Model Benefit Corporation Legislation and some state statutes, a minimum of two percent of the shareholders are needed to bring a benefit enforcement proceeding. *Id.* § 305(c)(2).

15 MODEL BENEFIT CORP. LEGIS. §§ 401–02; *see* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 254 (2014) (comparing the reporting requirements of the Model Benefit Corporation Legislation and the Delaware Public Benefit Corporation Law).

transparency claim, with some attention paid to the accountability claim as well.

C. Benefit Reporting Requirements

Sections 401 and 402 of the Model Benefit Corporation Legislation (the "Model") contain the benefit report requirements, which mandate the following narrative descriptions in the report:[16]

> (i) The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created. (ii) Both: (A) the ways in which the benefit corporation pursued a specific public benefit that the articles of incorporation state it is the purpose of the benefit corporation to create; and (B) the extent to which that specific public benefit was created. (iii) Any circumstances that have hindered the creation by the benefit corporation of general public benefit or specific public benefit. (iv) The process and rationale for selecting or changing the third-party standard used to prepare the benefit report.[17]

The Model also requires the following:

> An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard [to be] applied consistently with any application of that standard in prior benefit reports or [to be] accompanied by an explanation of the reasons for . . . any inconsistent application, or . . . the change to that standard from the one used in the immediately prior report.[18]

The benefit report must further contain names and addresses for any benefit director and benefit officer, compensation paid to each director for her services as director, an annual compliance statement from the benefit director, and disclosure of potential material conflicts between the third-party standard provider and the benefit corporation.[19] The statute makes clear that "[n]either the benefit report nor the assessment of the performance of the benefit corporation in the benefit report . . . needs to be audited or certified by a third

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16 MODEL BENEFIT CORP. LEGIS. §§ 401–02.

17 *Id.* § 401(a)(1).

18 *Id.* § 401(a)(2); *see also How Do I Pick a Third Party Standard?*, BENEFIT CORP., http://benefitcorp.net/third-party-standards/list-of-standards (last visited Oct. 8, 2015) [hereinafter *Third Party Standard*] (compiling some of the potential third-party standards).

19 MODEL BENEFIT CORP. LEGIS. § 401(a)(3)–(6).

party."[20] The benefit report must be sent to shareholders within 120 days of the end of the benefit corporation's fiscal year or at the same time as another annual report.[21] Each benefit corporation must publish the benefit report on a freely-accessible portion of its Internet website; if the benefit corporation does not have a website, it must make the benefit report available, free of charge, to anyone who asks.[22] Finally, the Model states that the benefit report must be filed with the Secretary of State at the same time the report is sent to shareholders.[23]

With the exception of the state-filing requirement, the vast majority of state benefit corporation laws have largely followed the Model's reporting requirements.[24] The resistance to the state-filing requirement may be due to the already strained state resources, even though the Model suggests states require a fee to accompany the filing of the benefit report, which could offset at least a portion of the costs to the state.[25] Currently, a minority of states require filing the report with a government entity;[26] a majority of states do not.[27] A few states have expressly stated penalties for failing to produce a benefit report, but most states have not stated a specific penalty and may be relying on the broad benefit enforcement proceedings to enforce the reporting requirements.[28]

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20 *Id.* § 401(c); *see also Make It Official*, BCORPORATION.NET, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official (last visited Oct. 8, 2015) (showing B Lab currently charges $500 to $50,000+ per year for its certification, depending on annual revenue of the company to be certified). The benefit corporation statutes, however, do not require certification, but rather only the use of a third-party standard. B Lab provides its third-party standard for free online. Clark & Babson, *supra* note 13, at 846.

21 MODEL BENEFIT CORP. LEGIS. § 402(a).

22 *Id.* § 402(b)–(c).

23 *Id.* § 402(d). The Model notes that "compensation paid to directors and financial or proprietary information" may be excluded from the filed and publicly posted versions of the benefit report. *Id.* § 402(c).

24 J. Haskell Murray, Corporate Forms of Social Enterprise: Comparing the State Statutes (Jan. 15, 2015) (unpublished chart), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556 [hereinafter Corporate Forms of Social Enterprise Chart].

25 MODEL BENEFIT CORP. LEGIS. § 402(d).

26 *See infra* Table B.

27 CAL. CORP. CODE § 14630 (Deering 2015); COLO. REV. STAT. §§ 7-101-501–509 (2015); CONN. GEN. STAT. ANN. § 33-1364 (West 2015); DEL. CODE ANN. tit. 8, § 366(b) (2015); FLA. STAT. ANN. §§ 607.612–613 (LexisNexis 2015); HAW. REV. STAT. §§ 420D-11–12 (2015); 805 ILL. COMP. STAT. ANN. § 40/5.01 (West 2015); LA. STAT. ANN. §§ 12:1831–1832 (2015); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08 (LexisNexis 2015); NEV. REV. STAT. ANN. §§ 78B.170–180 (LexisNexis 2015); N.Y. BUS. CORP. LAW § 1708 (McKinney 2015); OR. REV. STAT. ANN. § 60.768 (West 2015); VT. STAT. ANN. tit. 11A, § 21.14 (2015); VA. CODE ANN. § 13.1-791 (2015); WASH. REV. CODE ANN. § 23B.25.150 (LexisNexis 2015); W. VA. CODE ANN. § 31F-5-501 (LexisNexis 2015).

28 *See* Corporate Forms of Social Enterprise Chart, *supra* note 24.

Delaware cut its own path on benefit reporting and departed significantly from the Model. The Delaware Public Benefit Corporation ("PBC") law allows significantly more private ordering than does the Model.[29] For example, the Delaware PBC law requires a report no less than biennially (instead of annually) and does not require publication of the report on the Internet, unless specifically required by the given business's governing documents.[30] The Delaware PBC report must be sent to shareholders and must include:

> (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests; (2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests; (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and (4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.[31]

While benefit corporation proponents generally celebrate the passage of the Delaware PBC law and include it under the benefit corporation umbrella, representatives of B Lab have opposed Delaware's stance on benefit reports, considering it too flexible.[32] Colorado, which followed Delaware in many areas, adopted reporting requirements closer to the Model.[33] As will be shown below, however, none of the states' benefit reporting requirements are ideal, and all of the benefit reporting requirements could be improved through thoughtful statutory amendments.[34]

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29 Murray, *Social Enterprise Innovation*, *supra* note 5, at 351–54.

30 DEL. CODE ANN. tit. 8, § 366(b) (2015).

31 *Id.* § 366(b)(1)–(4).

32 *Governor Markell Signs Public Benefit Corporation Legislation*, NEWS.DELAWARE.GOV (July 17, 2013), http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/; Telephone Interview with Erik Trojian, Dir. of Policy, B Lab (Aug. 15, 2013) [hereinafter Trojian, Interview] (stating that Delaware's reporting requirements were not as strong as B Lab would like, due to the lower frequency and the lack of required posting or filing of the report). B Lab is a nonprofit organization that created the B Corp certification and has played the primary role in supporting benefit corporation legislation. *About B Lab*, BCORPORATION.NET, https://www.bcorporation.net/what-are-b-corps/about-b-lab (last visited Oct. 8, 2015).

33 COLO. REV. STAT. § 7-101-507 (2015).

34 *See infra* Part IV.B–C.

III. BENEFIT REPORT DATA

A. Hypothesis

Benefit corporation proponents have defended the benefit corporation statutes, in part, by arguing that the statutes promote greater transparency.[35] The required benefit report, using a third-party standard, is the primary method by which this transparency is supposedly accomplished.[36] The initial hypothesis was that reporting compliance would not be complete, but might reach 30–60% compliance.[37] As explained in more detail below, a low compliance could be explained by relatively high learning costs, limited resources of the relevant benefit corporations, and lack of effective statutory enforcement mechanisms.[38] As will be shown, the actual compliance rate is below 10%, which is significantly worse than the weak hypothesized compliance rate of 30–60%.[39]

B. Methodology

In July of 2014, I searched for the benefit reports of benefit corporations that were formed in 2012 or before from Virginia, New York, California, and Hawaii. I chose these four states because they were the only states that had benefit corporation statutes effective before 2012 and also made the dates of benefit corporation formation in their states freely available. While the number of states is rather small, the four states represent both the eastern and western United States and also represent some of the largest U.S. states. The benefit corporation sample, comprised of benefit corporations formed in or prior to 2012 in these four states, totaled 123 benefit corporations.[40] I searched the website for each benefit corporation in the sample, attempting to locate its

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35 PROPONENT WHITE PAPER, *supra* note 11, at 17–20; William H. Clark, Jr., *The New Pennsylvania Benefit Corporation Law*, 84 PA. B. ASS'N Q. 65, 69 (2013).

36 PROPONENT WHITE PAPER, *supra* note 11, at 17–20.

37 Richard L. Doernberg, *The Case Against Withholding*, 61 TEX. L. REV. 595, 599–603 (1982) (noting an estimated 60% compliance rate with filing of 1099 forms); *cf.* Matthew P. Harrington & Eric A. Lustig, *IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering*, 24 HOFSTRA L. REV. 623, 636 n.57 (1996) (noting a 42% compliance rate by small corporations filing of IRS Form 8300).

38 J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 110 (2012) (noting the lack of effective enforcement mechanisms in the benefit corporation law); *see, e.g.*, Message on LinkedIn from Brandi DeCarli, Farm from a Box, to J. Haskell Murray (July 10, 2014, 3:40 PM) (on file with author) (claiming that her company had not completed a benefit report because they "are in pilot mode without revenue yet," suggesting that she was not aware of the lack of a revenue-based exception for the benefit reporting requirements).

39 *See infra* Part III.C.

40 *See infra* Table A.

benefit report.[41] For the benefit corporations that did not have a website, I attempted to contact one or more representatives for the company or the company's registered agent.[42] I contacted all of these companies within a single week because the social enterprise community is small. If I elongated the process, I knew benefit corporation managers and their lawyers might begin to talk, quickly produce a report to satisfy my request, and skew the sample.[43]

C. Benefit Report Results

As mentioned in the previous section, the data set started with 123 benefit corporations from 4 states.[44] Of this group, 23 were inactive, dissolved, or merged out of existence per the Secretaries of States' websites.[45] This left an even 100 active benefit corporations in the sample.[46] Of the active benefit corporations, only eight percent had a benefit report.[47] Seventy-six of the active benefit corporations had a website, while 22 of the 24 benefit corporations without a website were non-responsive to e-mail or LinkedIn messages.[48] The two representatives that did respond admitted to not having produced a benefit report.[49] Even if the 22 non-responsive companies were removed from the sample, the compliance rate would only rise to approximately ten percent; however, the benefit corporation statutes require companies without websites to respond to requests and provide benefit reports to anyone who asks, so eight percent seems to be the more proper compliance rate.[50]

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41 While it is possible that I overlooked some benefit reports, I scoured each page of each website and if I somehow missed the benefit report, it is likely that the average shareholder or consumer would have a difficult time finding the benefit report.

42 I used e-mail, where available, and LinkedIn, where e-mail was not available or effective, to message the benefit corporation managers or registered agents.

43 As a result of this Article, I hope that benefit reporting compliance rates rise and reforms are made to the statutory reporting provisions. I am confident that compliance rates are already rising due, in part, to my discussion of the results of my research in social enterprise circles. However, I did not want to taint the data by drawing out the process and giving the benefit corporations time to quickly comply before I finalized my data.

44 *See infra* Table A.

45 *Id.*; *cf.* Eric T. Wagner, *Five Reasons 8 out of 10 Businesses Fail*, FORBES (Sept. 12, 2013), http://www.forbes.com/sites/ericwagner/2013/09/12/five-reasons-8-out-of-10-businesses-fail/ (claiming that approximately 80% of businesses fail within the first 18 months).

46 *See infra* Table A.

47 *Id.*

48 *Id.* As mentioned above, LinkedIn requests and messages were used when the e-mail addresses of the company representatives were not available or if the representatives did not respond to my e-mail messages.

49 Even armed with an admission of statutory violation, customers have no standing to challenge the failure to produce a benefit report.

50 CAL. CORP. CODE §§ 14600–14623 (Deering 2015); HAW. REV. STAT. §§ 420D-1–13 (2015); N.Y. BUS. CORP. LAW §§ 1701–1709 (Consol. 2015); VA. CODE ANN. §§ 13.1-782–791

IV. PAST, PRESENT, AND FUTURE OF SOCIAL REPORTING

A. *Overview of Mandatory Disclosure Literature*

Much has been written about corporate disclosure in the academic literature, and the lessons learned may be applied to the benefit corporation and social business experience.[51] Many, if not most, disclosure-related articles include a reference to Louis Brandeis's maxim that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[52] A strand of the legal scholarship has embraced the idea of mandatory disclosure and claims that more open access to company information is a solution for a number of regulatory issues.[53] Mandatory disclosure has been touted to address information deficits, reduce information asymmetry, and increase social utility by providing previously undisclosed data to corporate stakeholders.[54]

(2015). The 22 non-responsive benefit corporations could be on the verge of dissolution or not conducting business, though technically active. There is no exception in the statutory reporting requirements for benefit corporations that are pre-revenue, on the brink of dissolution, or just in the planning stages of the business.

51 *See, e.g.*, Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315 (2012).

52 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1933); *see, e.g.*, Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 605 (2013); Tamar Frankel, *The Failure of Investor Protection by Disclosure*, 81 U. CIN. L. REV. 421, 427 n.10 (2012); Henry T. C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1615 (2012); Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 479–80 (2007); Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 258 (2010); Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 492 (2013).

53 *See, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 721–22 (1984) (explaining the theoretical justifications for a mandatory disclosure system); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1337–42 (1999) (arguing in favor of our current federal, mandatory securities system and that giving issuers more choice in regulatory scheme would result in under-disclosure and social harm); Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123, 194 (2004) (arguing for increased mandatory disclosure for corporations, given the significant "potential cost of a market failure in public company disclosure practices"); Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1399–1400 (2002) (finding persuasive the claim that firms will not provide the socially optimal amount of information if left unregulated); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 9 (1983) (providing the justifications for a mandatory federal corporate disclosure system overseen by the Securities and Exchange Commission); Randall S. Thomas, *Improving Shareholder Monitoring and Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 369–71 (1996) (suggesting automatic or streamlined access to certain types of corporate records for certain shareholders).

54 Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT'L L. & BUS. 87, 91 (2014).

Proponents have argued that mandatory disclosure of social impact can supplement the occasionally insufficient power of market pressures and the social responsibility commitments of firms.[55] From the 1960s to the 1980s, George Stigler, Henry Manne, and George Bentson, among others, criticized the mandatory corporate disclosure system.[56] More recently, a new generation of scholars has joined in questioning the value of mandatory disclosure, or at least argues that we are "drowning in disclosure."[57] Even Warren Buffett has questioned the efficacy of disclosure, stating in the context of derivative regulation, that,

> [i]mproved "transparency"—a favorite remedy of politicians, commentators and financial regulators for averting future train wrecks—won't cure the problems . . . . When I read the pages

[55] Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 756 (2006); Park, *supra* note 54, at 93–94 (citing Larry E. Ribstein, A*ccountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1454–55 (2006)); Cynthia Williams, *Text of Remarks on Panel: "Codes of Conduct and Transparency,"* 24 HASTINGS INT'L & COMP. L. REV. 415, 421 (2001).

[56] George J. Benston, *The Costs and Benefits of Government-Required Disclosure: SEC and FTC Requirements: An Appraisal*, *in* CORPORATIONS AT THE CROSSROADS: GOVERNANCE AND REFORM 37 (Deborah A. DeMott ed., 1980); HENRY MANNE ET AL., WALL STREET IN TRANSITION (1974); George J. Benston, *An Appraisal of the Costs and Benefits of Government-Required Disclosure SEC and FTC Requirements*, 41 LAW & CONTEMP. PROBS., Summer 1977, at 30, 60 (arguing that, in general, the costs of government mandated disclosure exceeds the benefits); George J. Benston, *Required Disclosure and the Stock Market: Rejoinder*, 65 AM. ECON. REV. 473 (1975); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984); George J. Stigler, *Public Regulation of the Securities Markets*, 19 BUS. LAW 721 (1964).

[57] PAUL G. MAHONEY, WASTING A CRISIS: WHY SECURITIES REGULATION FAILS 78 (2015) (noting that disclosure has associated costs and that an increase in disclosure is not always advantageous); Celia R. Taylor, *Drowning in Disclosure: The Overburdening of the Securities & Exchange Commission*, 8 VA. L. & BUS. REV. 85, 87–88 (2014) (noting that the "SEC is increasingly becoming a disclosure dumping ground" and commenting on the "staggering number of disclosure issues that the SEC is either required or has chosen to take under its control"); *see also* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 679 (2011) ("Mandated disclosure is not doomed to fail, but it rarely succeeds. On analysis, one can see why failure is virtually inherent in the regulatory technique. Success requires three actors—lawmakers, disclosers, and disclosees—to play demanding parts properly. Rarely can each actor accomplish all that is needed, and therefore mandated disclosures rarely work as planned."); Manne, *supra* note 52, at 474 n.3 (noting that sometimes disclosure's costs outweigh its benefits); Omri Ben-Shahar & Carl E. Schneider, *The Futility of Cost Benefit Analysis in Financial Disclosure Regulation* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 680, 2014) [hereinafter *The Futility of Cost Benefit Analysis*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412688; Jesse Eisinger, *The Trouble with Disclosure: It Doesn't Work*, THE TRADE (Feb. 11, 2015, 1:00 PM), http://www.propublica.org/thetrade/item/the-trouble-with-disclosure-it-doesnt-work (questioning the usefulness of disclosures); Adam J. Levitin, *Disclosure Presentation*, PROPUBLICA (Oct. 11, 2013), http://www.propublica.org/documents/item/1657958-disclosure-presentation.html (noting that there is "scant empirical work on disclosure efficacy").

> of "disclosure" in 10-Ks of companies that are entangled with these instruments, all I end up knowing is that I *don't* know what is going on in their portfolios (and then I reach for some aspirin).[58]

In their 2014 book, *More Than You Wanted to Know: The Failure of Mandated Disclosure*, law professors Omri Ben-Shahar and Carl Schneider make a case against mandated disclosure as a legislative remedy, and their book includes citation to much of the relevant scholarship.[59] Ben-Shahar and Schneider admit that mandated disclosure might be an appropriate regulatory tool in some cases, but claim that the benefits of mandated disclosure are often greatly exaggerated and the costs of mandated disclosure are often seriously underestimated.[60] On the exaggerated benefits of mandated disclosure, the authors point to the complexity of many disclosures, the innumeracy and illiteracy of many readers, and the burden of the accumulating amounts of disclosure as things that limit the effectiveness of disclosure.[61] According to the authors, the underestimated costs of mandated disclosure include less focus on better regulation, significant expenditures to collect data and draft disclosures, and the burden on the public of dealing with the many disclosures.[62] Ben-Shahar and Schneider do not offer a replacement for mandated disclosure, claiming instead that there is no panacea and arguing that each issue should be considered on its own terms with the appropriate regulatory tools employed.[63] For benefit corporations, a balance must be struck between the benefits of the mandatory disclosures to various corporate stakeholders and the costs of the disclosures for the firms.

B. Corporate Theory and Reporting

Views on mandatory benefit reporting may depend on the theory of the corporation that is embraced. Professor Stefan Padfield helpfully summarizes theories of the corporation into five basic categories: entity theory, contract theory, concession theory, process theory (including director-primacy and

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58 Letter from Warren E. Buffett, Chairman of the Bd., Berkshire Hathaway Inc., to S'holders, Berkshire Hathaway Inc. (Feb. 27, 2009), http:// www.berkshirehathaway.com/ letters/2008ltr.pdf.

59 *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

60 *Id.* at 182–83.

61 *Id.* at 14–118.

62 *Id.* at 169–82; *see also The Futility of Cost Benefit Analysis*, *supra* note 57, at 9–10 (claiming that the costs of mandated disclosure appear extremely low, but that costs from regulating, complying, and litigating due to mandated disclosures are quite significant).

63 BEN-SHAHAR & SCHNEIDER, *supra* note 59, at 190–95.

team-production theory), and nexus-of-contracts theory (contractarianism).[64] While scholars could quibble on the categories and the nuances of the definitions, these rough divisions will suffice for the purpose of this Article, and the Article will focus only on the last three: concession theory, process theory (including director-primacy and team-production theory), and nexus-of-contracts theory (contractarianism).[65]

Concession theory focuses on the grants of limited liability, transferability of ownership, and potentially permanent legal existence by the state to the corporation.[66] Due to these grants by the state, concession theory assumes that the government may regulate the corporation and that the corporation should benefit society.[67] Concession theory was most popular between the 17th and 19th centuries, and the theory stems from a time when the state granted charters individually and based on some social benefit.[68] In 1978, the Supreme Court of the United States referred to concession theory as an "extreme position," but the Supreme Court's characterization of concession theory was an argument that "corporations, as creatures of the State, have *only* those rights granted them by the State."[69] More recently, scholars have chosen

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[64] Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 835–37 (2013) (noting that concession theory and artificial entity theory; nexus of contracts (contractarianism) and aggregate theory; and process theory and real (natural) entity theory are three essentially synonymous pairs).

[65] Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 330–31 (2014) [hereinafter Padfield, *Rehabilitating Concession Theory*] (describing the three main theories under corporate law, as opposed to constitutional law, as "(1) concession theory, (2) [process theory] director-primacy and team-production theory, and (3) nexus-of-contracts theory (contractarianism)").

[66] *Id.* at 332–33 (citing REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 5 (2d ed. 2009)).

[67] *Id.* at 355.

[68] Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) (stating that "at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable"); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 37 n.42 (2014); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630, 1640 [hereinafter Pollman, *Reconceiving Corporate Personhood*] (claiming that "[v]iewing the corporation as a concession from the state is a relic of a time before incorporating became a mere administrative formality." Pollman later notes that "[t]he economic expansion of [the end of the 19th century] and the transition from special chartering to general incorporation eroded the persuasiveness of the concession theory, as the connection between a corporate charter and a state act became less significant.").

[69] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (emphasis added); *see also* Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1011–12 (discussing the decline of the concession theory); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 212 (stating that "[t]he decline of the *ultra vires* idea most clearly reveals movement away from the artificial entity concept of corporate power that was inherent in special chartering. . . . [T]raditional 19th-century theory insisted that corporations lacked any powers beyond those conferred by the legislature. As early as 1898, a treatise writer

to define concession theory as merely giving "deference to government regulation, as opposed to removing all limits on the state's right to regulate corporations."[70] This theory fits with benefit corporation reporting in the sense that it provides support for states to regulate firms. Concession theory makes even more sense in the benefit corporation context because the state is making an additional grant to firms, the positive moniker of "benefit corporation."

Director primacy[71] and team production theory[72] both consider the board of directors in ultimate control of the corporation; both theories can be grouped in what Robert W. Hamilton and Richard Booth call "process theory."[73] On occasion, Stephen Bainbridge's director primacy theory has been coupled with a shareholder wealth maximization norm,[74] while in the team production theory Margaret Blair and Lynn Stout claim that the board of directors acts as a mediating hierarch among various stakeholders for the benefit of the corporation as a whole.[75] The benefit reporting provisions may tie directors' hands more than an extreme director primacy advocate would prefer, but corporate reporting requirements are not new and can be seen simply as part of the regulatory system within which the directors operate.[76] For team production theorists, the benefit reporting requirements may even help facilitate the mediating role of the board, by requiring some contemplation and

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could state that the *ultra vires* doctrine was 'disappearing.' By the 1920s, most states accepted the view that a corporation could not plead *ultra vires* in defense to a suit on a wholly or even partly executed contract. Also rejected was the old rule preventing shareholder validation of *ultra vires* conduct. These conclusions implicitly denied that corporations possessed only such powers as the state conferred on them. By 1930, the doctrine of *ultra vires* had attained its present insignificance." (citations omitted)).

[70] Padfield, *Rehabilitating Concession Theory*, *supra* note 65, at 333. *See generally* David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 221 (2013).

[71] *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) [hereinafter Bainbridge, *Director Primacy*].

[72] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287–98 (1999) (describing a team production model for corporation law).

[73] ROBERT W. HAMILTON & RICHARD A. BOOTH, BLACK LETTER OUTLINES: CORPORATIONS 327–32 (5th ed. 2006).

[74] Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–25, 1442 (1993) (arguing that directors are ultimately in control of the corporation, but that the directors should exercise their discretion to place shareholder interests ahead of non-shareholder interests); *accord* Bainbridge, *Director Primacy*, *supra* note 71, at 549–50.

[75] *See generally* Blair & Stout, *supra* note 72.

[76] Bainbridge, *Director Primacy*, *supra* note 71, at 564 (quoting economist Milton Friedman in noting that decision-making in a corporation is constrained by "the basic rules of society"); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 102–03 (2004) (describing the broad powers of the board of directors, but also noting the contractual and legal limits of those powers).

discussion of a wide range of stakeholder interests.[77] The required use of a third-party standard may be seen as another burden on the board, but the Model Benefit Corporation Legislation, upon which many state benefit corporation statutes are based, allows benefit corporations, presumably through the board of directors, to retain authority over deciding which third-party standard to apply.[78]

The nexus-of-contracts theory[79] and contractarianism[80] view the corporation not as a separate entity, but as an accumulation of private contracts between stakeholders.[81] The contractarian model views the firm as "a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm."[82] In the contractarian model, statutes play the role of establishing defaults and reducing transaction costs, but

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77 Blair & Stout, *supra* note 72, at 275–79 (explaining that directors should consider the interests of various team members, not just shareholders, when acting for the good of the corporation); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1203 (2002) (describing team production theory as suggesting that allowing directors to consider various stakeholders may encourage firm-specific investment by those stakeholders); *accord* Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside Out*, 2013 U. ILL. L. REV. 1131, 1151 n.114.

78 MODEL BENEFIT CORP. LEGIS. § 401(a)(1)(iv) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf (stating that the benefit corporation must disclose the "process and rationale for selecting or changing the third-party standard").

79 *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 18 (1996) (stating that the firm is "a nexus of contracts," in other words the "firm is in essence the common signatory of a group of contracts"); Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 25–29 (2002) (arguing that the board of directors serves as the nexus of contracts for the firm). *But see* Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 830–36 (1999) (challenging the nexus-of-contracts conception of the firm). *See generally* Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

80 Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 905 (2012) (describing aggregate theory as consistent with the contractarian approach).

81 Mohsen Manesh, *Legal Asymmetry and the End of Corporate Law*, 34 DEL. J. CORP. L. 465, 470 (2009) (stating that "contractarians argue, on freedom of contract principles, that corporate law should permit shareholders to waive or modify the fiduciary duties of their corporate managers, while so-called anti-contractarians argue, on equitable principles, that corporate managers should be subject to certain minimum standards of conduct embodied by the law of fiduciary duties"); Millon, *supra* note 69, at 201 (describing a major "distinction between the corporation as an entity, with a real existence separate from its shareholders and other participants, and the corporation as a mere aggregation of natural individuals without a separate existence"); Pollman, *Reconceiving Corporate Personhood*, *supra* note 68, at 1641.

82 STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 27–28 (2002) (explaining that the term contract is used loosely in the contractarian model to mean "any process by which property rights to assets are created, modified, or transferred").

typically enable stakeholders to bargain around the default rules.[83] The Model Benefit Corporation Legislation departs from contractarianism through a number of mandatory provisions that firms may not contract around, such as the general public benefit purpose, third-party standard usage, benefit reporting, and stakeholder consideration.[84] Delaware's PBC law, however, has more contractarian roots, allowing firms to contract regarding third-party standard usage and the specific benefit purpose chosen. Still, Delaware law does mandate that the firms "operate in a responsible and sustainable manner" and that directors balance the interest of "those materially affected by the corporation's conduct" with the interests of shareholders and the specific public purpose(s).[85] Reporting is also required by Delaware, but Delaware allows firms to choose to report only every other year (instead of annually) and the reporting does not have to be publicly disclosed unless agreed to in the firm's governing documents.[86]

As described above, each of the three major theories is at play in the different benefit corporation statutes. In the benefit corporation area, most states have mostly gravitated toward either the Delaware framework or the Model Benefit Corporation framework.[87] The Delaware public benefit corporation law largely favors private ordering and appears to favor a nexus-of-contracts theory of the firm with fewer mandatory and more enabling provisions than the Model Benefit Corporation Legislation framework.[88] Both Delaware and the Model draw on portions of concession theory. Both frameworks require directors to balance or consider the interests of a broad group of stakeholders, benefiting society, likely in part because of the various concessions by the state. In this case, the concession made by the state is not only allowing incorporation and limited liability, but also bestowing the

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83 *Id.* at 29–33 (stating that "[c]ontractarians assume that default rules are preferable to mandatory rules in most settings;" claiming "[m]andatory rules are justifiable only if a default rule would demonstrably create significant negative externalities or, perhaps, if one of the contracting parties is demonstrably unable to protect itself through bargaining;" and calling the nexus of contracts theory the "dominant theory of the firm in the legal academy").

84 *See generally The Model Legislation*, BENEFIT CORP., http://benefitcorp.net/attorneys/model-legislation (last visited Oct. 8, 2015).

85 DEL. CODE ANN. tit. 8, § 362(a) (2015).

86 *Id.* § 366.

87 Corporate Forms of Social Enterprise Chart, *supra* note 24.

88 *See* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1620–21 (1989) (describing the mandatory and enabling aspects of corporate law); *accord* Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1461 (1989); *cf.* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (noting the importance of private ordering in Delaware corporate law); *see infra* Table C. The Social Purpose Corporation laws, which favor flexibility and private ordering as much or more than Delaware, are beyond the scope of this Article. *See generally* Murray, *Social Enterprise Innovation*, *supra* note 5.

favorable name of "benefit corporation." Both Delaware and the Model also appear to pull from director primacy and team production theory. Team production theory is probably the closest fit due to the statutory mandate to consider a wide range of stakeholders. Neither Delaware nor the Model appear to change the director primacy framework of current corporate law, but the benefit corporation laws require directors to consider the interests of many corporate stakeholders.[89]

C. *Current State of Benefit Reporting*

The data discussed in this Article suggests that the vast majority of benefit corporations are not complying with the statutory benefit reporting requirements.[90] Explanations for a compliance rate under ten percent could include (1) relatively high learning costs, (2) the prevalence of small benefit corporations with extremely limited resources, and (3) lack of sufficient enforcement mechanisms.[91] Each of these explanations for the low compliance rate is discussed in more detail below, followed by a critique of the underlying substantive statutory provisions.

1. Potential Causes of Benefit Reporting Noncompliance

As with most legal changes, substantial learning costs may be incurred as the market adjusts to the requirements.[92] The benefit corporation form is still not well known and the intricacies of the statutory requirements are even less

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[89] MODEL BENEFIT CORP. LEGIS. § 101(c) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf (stating that "[e]xcept as otherwise provided in this [chapter], [the enacting state's business corporation law] shall be generally applicable to all benefit corporations"); DEL. CODE ANN. tit. 8, § 141(a) (2015) (stating that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors").

[90] *See supra* Part III.C.

[91] Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 816–23 (2002); *accord* ORG. FOR ECON. CO-OPERATION & DEV., REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE 7–8 (2000), http://www.oecd.org/gov/regulatory-policy/46466287.pdf (stating "[n]ew rules may need to be accompanied by information campaigns to ensure that they are brought to the notice of and made comprehensible to the target group. . . . For small businesses in particular, the burden of assimilating and complying with many complex and technical rules can be unreasonable and undermine confidence in regulators and the regulatory structure"); Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 796 (2007); Michael P. Van Alstine, *Treaty Law and Legal Transaction Costs*, 77 CHI.-KENT L. REV. 1303, 1306–08 (2002).

[92] Van Alstine, *The Costs of Legal Change*, *supra* note 91, at 816–23 (noting and explaining the learning costs arising from new law).

widely known.[93] Even corporate attorneys may be unaware of the existence of the relatively new benefit corporation form, not to mention the particulars of the reporting requirements.[94] Michael Van Alstine has noted that learning costs associated with new laws include time and resources to identify, analyze, and digest the changes.[95] Widespread noncompliance can be explained, in part, due to the nascent stage of benefit corporation laws and the resources that will be needed for broader understanding of the requirements.

The small size of many benefit corporations is also a likely cause of widespread benefit reporting noncompliance.[96] In this Article's data, roughly a quarter of the benefit corporations do not even have websites.[97] Most of the benefit corporations likely do not have consistent, sophisticated legal counsel and even learning of the legal requirements of operating a benefit corporation may be difficult for entities with such limited resources. Larger benefit corporations such as Patagonia and Greyston Bakery did produce benefit reports, and perhaps lack of financial and temporal resources is a main cause of noncompliance among smaller benefit corporations.[98]

Lack of effective statutory enforcement mechanisms may be another explanation of widespread benefit report noncompliance. None of the four state benefit corporation statutes relevant to this Article's data require filing of the

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93 JEFFREY F. BEATTY ET AL., BUSINESS LAW AND THE LEGAL ENVIRONMENT 774 (6th ed. 2013) (improperly stating that benefit corporations must be certified); Haskell Murray, *Etsy Becomes a Certified B Corporation*, THE CONGLOMERATE (May 9, 2012), http://www.theconglomerate.org/2012/05/etsy-becomes-a-certified-b-corporation.html (noting that Etsy conflated the "benefit corporation" and "certified B corporation" terms). In fact, benefit corporations do not have to be certified, they simply must use a third-party standard. MODEL BENEFIT CORP. LEGIS. § 401(c) (noting that there is no need for the benefit report to be audited or certified by a third party).

94 While familiarity with benefit corporations is improving nationwide, there still seem to be relatively few attorneys with a firm grasp of the details of the benefit corporation laws. Van Alstine, *supra* note 91 (opining that lay people typically outsource the learning costs to legal professionals); *Find an Attorney*, BENEFIT CORP., http://benefitcorp.net/attorneys/find-an-attorney (last visited Oct. 8, 2015) (listing attorneys interested in or with expertise in benefit corporation law).

95 Van Alstine, *The Costs of Legal Change*, *supra* note 91, at 816–23.

96 Rick Cohen, *Some Unanswered Questions About Benefit Corporations, L3Cs, and Social Enterprise More Generally*, NONPROFIT Q. (Apr. 28, 2014), http://nonprofitquarterly.org/2014/04/28/some-unanswered-questions-about-benefit-corporations-l3cs-and-social-enterprise-more-generally/ (stating that most "social enterprises appear, for the moment, to be small businesses"); Matt Pilon, *Benefit Corporations Prepare to Launch*, HARTFORD BUS. (Sept. 15, 2014), http://www.hartfordbusiness.com/article/20140915/PRINTEDITION/309119959/benefit-corporations-prepare-for-launch (noting that there are a few large benefit corporations, but that most are small businesses).

97 *See infra* Table A.

98 *See infra* Table D.

benefit report with the state or provided express penalties for non-compliance.[99] Benefit enforcement proceedings may be used for curbing non-compliance, though most statutes do not mention benefit report violations specifically; the statutes simply state that benefit enforcement proceedings can be brought for violations of the benefit corporation law in general.[100] Currently, however, automatic standing to bring benefit enforcement proceedings is only given to shareholders, directors, and owners of five percent or more of the equity in the benefit corporation's parent company.[101] Thus, the vast majority of stakeholders that the benefit corporation statute requires directors to consider are relatively helpless in enforcing their rights.[102] Tamar Frankel, in her book *Trust and Honesty*, claims that "[w]eak or no enforcement signals to the public that breaking the law is not 'really very wrong.'. . . Morals and laws shape one another."[103] Here, enforcement of benefit corporation reporting requirements seem incredibly weak, leading to early evidence of high levels of non-compliance, and, perhaps, a growing acceptance of violating the statutory reporting requirements.

Shareholders, especially a new crop of "impact investors," may be willing to protect the interest of other stakeholders, but it remains to be seen whether shareholders will be vigorous in protecting other stakeholders, especially when the stakeholder interests conflict with the economic interests of shareholders.[104] Even if shareholders are socially conscious and willing to play the role of enforcer, some statutes limit standing to shareholders or groups of shareholders holding two percent or more of the outstanding stock of the

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99 Corporate Forms of Social Enterprise Chart, *supra* note 24. Presumably, states like Minnesota, which have statutes that require both filing the benefit report with the state and include an express, significant penalty for noncompliance will experience much higher compliance rates. MINN. STAT. § 304A.301(5) (2015) (stating that "[i]f a public benefit corporation fails to file . . . the annual benefit report required by this section, the secretary of state shall revoke the corporation's status as a public benefit corporation").

100 MODEL BENEFIT CORP. LEGIS. § 305(a) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf. Currently, Nevada appears to be the only state that expressly provides for the use of an enforcement proceeding for noncompliance with the reporting requirements. NEV. REV. STAT. § 78B.030(3) (2013).

101 MODEL BENEFIT CORP. LEGIS. § 305(c)(2)(i)–(iii).

102 *Id.* § 301(a)(1) (listing seven groups of stakeholders that directors of benefit corporations must consider, including, shareholders, employees, customers, community, and the environment).

103 TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 114 (2006).

104 *See* ANTONY BUGG-LEVINE & JED EMERSON, IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE 10–11 (2011) (describing impact investors who seek not only economic value, but also social and environmental value). Even if impact investors do not file benefit enforcement proceedings with significant frequency, the ability to make a credible threat to sue may lead to greater benefit corporation compliance.

benefit corporation.[105] Further, the statutory prohibition on monetary damages in benefit enforcement proceedings will likely limit the frequency and effectiveness of these lawsuits.[106] The benefit corporation proponents' white paper suggests that the reporting requirements are for the benefit of both shareholders and the general public, including customers.[107] While the shareholders might be adequate guardians of their own interests, it does not seem likely that shareholders will do an adequate job defending the interests of the general public. Benefit corporation proponents might argue that the general public will pressure benefit corporations to use a good third-party standard, but, if pressure from the general public is sufficient, the benefit corporation statutes themselves would appear unnecessary.[108] Some may argue that the benefit corporation statutes are helping shape a norm, and even if enforcement is relatively low, the social norms will help enforce the intent of the statute.[109] While statutes might help shape norms in some cases, at least occasional enforcement of the statute or judicial denouncement of offending behavior is likely needed for creation of a strong norm.[110]

2. Substantive Problems with Benefit Reporting Provisions

Even perfect compliance rates, however, will not remedy all the problems with the current benefit corporation statutes. The substantive statutory provisions of the benefit reporting requirements are also flawed. The reporting

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105 Corporate Forms of Social Enterprise Chart, *supra* note 24 (showing eight states with the two percent equity stake requirement for shareholder standing in benefit enforcement proceedings).

106 MODEL BENEFIT CORP. LEGIS. § 305(b); *cf.* Lawrence A. Hamermesh, *Twenty Years After* Smith v. Van Gorkom*: An Essay on the Limits of Civil Liability of Corporate Directors and the Role of Shareholder Inspection Rights*, 45 WASHBURN L.J. 283, 288–90 (2006) (claiming that even concepts, like the duty of care, that are not legally enforced may still deter poor conduct if directors fear public embarrassment in a judicial opinion. However, if monetary damages are unavailable or unlikely, the plaintiff's bar may not bring those cases and the threat of embarrassment will dissipate.).

107 PROPONENT WHITE PAPER, *supra* note 11, at 19–20.

108 Trojian, Interview, *supra* note 32 (claiming that the market would punish benefit corporations that provide less transparency and weak reports).

109 *See, e.g.*, Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1328 (2001) (noting that law can reinforce norms); Edward M. Iacobucci, *Corporate Fiduciary Duties and Prudential Regulation of Financial Institutions*, 16 THEORETICAL INQUIRIES L. 183, 193 (2015) (noting the social norm for complying with the law).

110 Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1106 (1997) (describing Delaware corporate law decisions in the fiduciary duty context as parables of good and bad actors, which may affect director behavior, even if the duties are not enforced); Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL'Y REV. 1, 56 (2015) (arguing that "corporate law shapes behavior not through imposing liability, but rather through producing information" and affecting reputations).

requirements are overly vague, in addition to being under-enforced. As noted above, the statutes merely require narrative descriptions of the ways public benefit was created by the company and the hindrances the company faced.[111] The statutes do not require reporting of quantifiable items and give the benefit corporations an extreme amount of freedom in deciding what to report.[112] Benefit corporation proponents claim that the third-party standard requirement is at the heart of the benefit corporation legislation and works with the reporting requirements for transparency.[113] There is, however, little to no oversight or assurance of quality with regards to the third-party standards.[114] The state benefit corporation statutes usually require that the third-party standard be "comprehensive," "credible," and "transparent," but do not clearly explain what these terms mean or how the requirements will be enforced.[115] Further, the statutes do not appear to provide a clear enforcement mechanism to ensure that the third-party standards are actually useful. One benefit corporation listed "John Franco" as their third-party standard, which may or may not comply with the statute, but if shareholders choose not to challenge, then there does not appear to be a way to make sure the third-party standard even complies with the minimal requirements of the benefit corporation statute, for the benefit of all stakeholders.[116]

D. *Future of Social Reporting*

Currently, the benefit corporation reporting suffers from low compliance rates and weak substantive provisions. Existing statutes could be strengthened through amendments. States that are considering benefit corporation legislation for the first time should consider departing from existing

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111 *See supra* Part II.C.

112 MODEL BENEFIT CORP. LEGIS. §§ 401–02 (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.

113 PROPONENT WHITE PAPER, *supra* note 11, at 18.

114 *Third Party Standard*, *supra* note 18 (listing roughly a dozen, varying, third-party standards, which, they note is not an exhaustive list).

115 MODEL BENEFIT CORP. LEGIS. § 102(a). Perhaps, the third-party standard requirements could be enforced by a benefit enforcement proceeding, but this seems suboptimal as shareholders may choose not to enforce if the third-party standard is low cost, and the benefit enforcement proceedings do not provide for the recovery of monetary damages.

116 *2013 Benefit Corporation Report*, NELLA TERRA CELLARS, http://www.nellaterra.com/about-us/ (last visited Oct. 8, 2015). Courts have not provided guidance on whether a single, relatively unknown individual could serve as a statutorily compliant third-party standard, though the "credible" requirement included in some state benefit corporation statutes might create an issue. According to the California benefit corporation statute, a third-party standard must be "comprehensive," have "no material financial relationship with the benefit corporation," "[a]ccess[] necessary and appropriate expertise to assess overall corporate social and environmental performance," "[u]se[] a balanced multistakeholder approach, including a public comment period of at least 30 days to develop the standard," and make the information about the third-party standard publicly available. CAL. CORP. CODE § 14601 (Deering 2015).

models to improve reporting requirement. Suggestions for improvement follow below.

First, and most obviously, compliance rates could likely be improved dramatically by requiring state filing and clear, significant consequences for non-compliance.[117] Currently, a handful of states and the Model Benefit Corporation Legislation require filing the benefit report with the Secretary of State.[118] Most states, however, have resisted requiring benefit report filing with the state, likely due to state resource limitations.[119] Even required state filing may not be effective without express penalties for non-compliance. A few states have adopted express penalties for non-compliance with benefit reporting. Minnesota's public benefit corporation statute provides that if "a public benefit corporation fails to file an annual benefit report in accordance with this section within 90 days of the date on which an annual benefit report is due, the secretary of state shall revoke the corporation's status as a public benefit corporation."[120] Using the loss of benefit corporation status as the only punishment for noncompliance may be unwise, as benefit corporations unsatisfied with the form may try to use not filing a report to convert to a traditional corporation without having to obtain the super-majority shareholder approval generally required. While Minnesota provides for dissenters' rights, the payment of fair value to shareholders, if the failure to file the benefit report is intentional, proving scienter in these cases may be extremely difficult.[121] Better penalties for non-compliance with the statutory reporting requirements could include fines and eventual administrative dissolution.[122] Florida's benefit corporation statute provides a reasonable enforcement scheme. In Florida, the benefit corporation statute utilizes private enforcement by allowing courts to award costs and attorney fees to the shareholders that bring benefit reporting failure to the attention of the court.[123] The benefit reports, however, are not just

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117 Corporate Forms of Social Enterprise Chart, *supra* note 24 (showing 13 states and the model legislation that require state filing of the benefit corporation reports in their corporate social enterprise statutes). Social enterprise statutes include benefit corporations, general benefit corporations, public benefit corporations, sustainable business corporations, specific benefit corporation, and social purpose corporation. *Id.*

118 *Id.* We will be able to test whether these provisions requiring state filing are effective in coming years when the statutes are more mature and there is data to analyze.

119 *Id.*

120 MINN. STAT. ANN. § 304A.301(5) (West 2015).

121 *Id.* § 304A.301(7).

122 N.H. REV. STAT. ANN. § 293-C:13 (LexisNexis 2015) (stating that "[i]f the secretary of state determines that a benefit corporation established pursuant to this chapter fails to make available its annual benefit report pursuant to RSA 293-C:12 and RSA 293-C:13, the secretary of state shall administratively dissolve the corporation").

123 FLA. STAT. ANN. § 607.613 (West 2015); *cf.* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012) (describing government's attempt to "control undesirable behavior [through, among other options]. . . regulation via private litigation in courts").

for the shareholders' benefit; customers, employees, and other stakeholders are potential beneficiaries of the reporting and could make an argument to be given statutory standing. Giving standing to other stakeholders, even for the narrow case of enforcing reporting, might concern managers. Therefore, perhaps the statute could provide for a demand letter to the board of directors, followed by a reasonable waiting period, and fee-shifting if frivolous cases are brought.[124]

Second, even if compliance rates were improved by the methods above, there would still be problems with the weakness of the substantive provisions of the reporting requirements. As described in the previous section, the benefit reporting requirements are quite general and vague, merely requiring a narrative description of the ways the public benefit was pursued, created, and hindered.[125] Picking more objective reporting items, however, would be difficult given the various industries that benefit corporations span.[126] A detailed, rules-based approach to reporting might also suffocate firms, stifle innovation, and decrease intrinsic motivation.[127] Instead, perhaps the statutes could retain some autonomy in reporting, and add a bit more specificity to the requirements, by allowing each benefit corporation (or the third-party standard by which the benefit corporation is measured) to choose at least a few quantifiable items. To allow stakeholders to identify trends, the statutes could require benefit corporations or third-party standard providers to commit to the chosen metrics for a set number of years, perhaps five years.[128] Requiring third-party standard providers to set metrics might be the superior route as it would allow comparison between the benefit corporations that choose the same

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124 The demand requirements could be modeled on Delaware's books and records statute. DEL. CODE ANN. tit. 8, § 220 (2015). Requiring a demand letter to the board would respect the director primacy model of corporate governance. *See generally* Bainbridge, *Director Primacy*, *supra* note 71.

125 *See supra* Part IV.C.2.

126 Perhaps "percentage of employees paid a livable wage" could be one objective measure to require in reporting, though some industries pay much higher wages than others. Perhaps "percentage of revenue or hours of time given to charity" could be another objective measure to require in reporting, though this might discourage benefit corporations that create socially focused products and services, yet do not give to charity.

127 Park, *supra* note 54. *See generally* Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 CONTEMP. EDUC. PSYCHOL. 1, 54–67 (2000) (suggesting that hampering autonomy can limit intrinsic motivation and that threats, such as those accompanying extrinsic directives, can undermine intrinsic motivation).

128 There would need to be a mechanism to amend the reporting if the business pivoted. Perhaps, approval by both the shareholders and the third-party standard provider would prove sufficient. Currently, most benefit corporation statutes require reporting any change in third-party standard provider and any inconsistency in the *application* of the third-party standard. *See* MODEL BENEFIT CORP. LEGIS. § 401(a) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf. The statutes are less clear, however, regarding changes in the way a given third-party standard measures impact, and even if the statutes required reporting of those changes, mere disclosure may not be sufficient to lead to useful, consistent social reporting by benefit corporations.

standard; the freedom of benefit corporations choosing the metrics would be limited if this route were followed, but the benefit corporations would still remain free to choose the most appropriate third-party standard.

Third, while most benefit corporation statutes require use of a third-party standard, the quality of the standard used is not currently regulated.[129] More recent benefit corporation statutes do use qualifying words for the third-party standard like "recognized," "credible," and "transparent," but, to date, no case law has determined exactly what these words mean or which third-party standards will be statutorily sufficient.[130] Third-party standard providers, if regulated or overseen, might be as useful as proponents hope them to be. Perhaps state benefit corporation statutes should require an additional fee to fund a regulator, given that most state governments are stretched to a breaking point.[131] Alternatively, perhaps a private enforcement system could be set up by providing incentives to private actors to regulate the third-party standard providers. The third-party standard providers purport to protect consumers and other stakeholders, but the quality and effectiveness of the third-party standard providers should be monitored.[132] The government is bestowing the name "benefit corporation" on these entities and thus should be allowed to ensure that some benefit to society is actually being provided.[133]

Finally, perhaps there should be a reporting exception, or scaling in the reporting requirements, for small and/or young benefit corporations. The emerging growth company definition of $1 billion in annual gross revenue or

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129 *Third Party Standard*, *supra* note 18 (providing a non-exhaustive list of third-party standards).

130 MODEL BENEFIT CORP. LEGIS. § 102; Corporate Forms of Social Enterprise Chart, *supra* note 24.

131 Such a fee, however, might render benefit corporations even less popular, given the additional costs and current relatively low benefit. Joan Heminway, *Why Do Social Enterprise Entrepreneurs Want Benefit Corporations?*, BUS. L. PROF BLOG (Apr. 2, 2015), http://lawprofessors.typepad.com/business_law/2015/04/why-do-social-enterprise-entrepreneurs-want-benefit-corporations.html (questioning the usefulness of the benefit corporation law, especially for small companies, given the additional burdens already imposed by the statutes). The United Kingdom's regulator of Community Interest Companies ("CIC") runs on a limited budget and staff. *See About Us*, GOV.UK, https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies/about (last visited Oct. 8, 2015) (noting that the CIC regulator works part-time and is supported by a staff of six individuals). The CIC Regulator oversees over 10,000 CICs, has achieved nearly 100% reporting compliance, and has a budget under 300,000 pounds. *See* MORGAN LEWIS, LEGAL ISSUES IN IMPACT INVESTING: AT HOME AND ABROAD (2015).

132 The ineffectiveness of rating agencies in the most recent financial crisis can foreshadow possible problems with third-party standards if the third-party standards are under-regulated. *See* Kia Dennis, *The Ratings Game: Explaining Rating Agency Failures in the Build Up to the Financial Crisis*, 63 U. MIAMI L. REV. 1111, 1149 (2009) (suggesting increased disclosure and increased potential liability for wrongdoing by rating agencies).

133 *See supra* Part IV.B (discussing concession theory and the governmental grant of privileges to business entities).

less, recently utilized by the Securities and Exchange Commission, might be a possible threshold to set, though it would exclude virtually all of the current benefit corporations.[134] A threshold of $1 million, or even $100,000, in annual gross revenue would exclude many benefit corporations and would place the reporting burdens more appropriately on entities that could properly bear them. If the statutes were amended to exclude some benefit corporations from mandatory reporting, those excluded benefit corporations could always opt-in and voluntarily comply. As to where the benefit reports should be located, given that approximately a quarter of the active benefit corporations in this sample do not even have a website, perhaps the benefit reports could be provided on the relevant Secretary of State's website with open access to potential customers and investors.[135] Locating the benefit reports of all benefit corporations from a particular state in a single place would also allow stakeholders to compare benefit corporations to one another.[136] Both scaling of the reporting requirements and ensuring that the reports are publicly available would go a long way in improving benefit reporting. Legal clinics, such as those at Georgetown and UC-Hastings, might be able to help smaller benefit corporations with reporting compliance if no size-based exception is granted.[137] In short, benefit corporation statutory reporting requirements still have significant opportunities for improvement.

V. CONCLUSION

This Article has considered the benefit corporation reporting requirements by examining data, policy, and theory. After analysis, this Article has shown that the benefit corporation statutes' reporting scheme is in need of significant improvement. The benefit corporation statutes analyzed in this

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134 *Jumpstart Our Business Startups Act: Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act*, SEC (Aug. 16, 2012), http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm (noting that an "emerging growth company" is "an issuer with 'total annual gross revenues' of less than $1 billion during its most recently completed fiscal year").

135 *See infra* Table A. States with stretched budgets may balk at the idea of any additional infrastructure to provide these reports. Alternatively, one or multiple universities could assist with compiling and posting the benefit reports.

136 Comparison may be more difficult if varying third-party standards are used, but in this sample seven out of eight of the benefit corporations used B Lab as their third-party standard provider.

137 *Social Enterprise and Nonprofit Clinic*, GEO. L. CTR., https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/ (last visited Oct. 8, 2015); *Social Enterprise & Economic Empowerment Clinic*, UC HASTINGS, http://www.uchastings.edu/academics/clinical-programs/clinics/socialenterpriseandeconomicempowerment/index.php (last visited Oct. 8, 2015).

Article have yielded abysmally low compliance rates below ten percent.[138] Further, the benefit corporation statutes' substantive reporting requirements are vague and subject to little oversight.[139] In theory, the third-party standard providers could offer the necessary oversight, but the third-party standard providers are unregulated and of varying quality.[140] Improved benefit corporation reporting could be achieved by required state filing, significant non-compliance penalties, quantitative reporting requirements, and regulation of third-party standard providers. Future research can build on this initial study and its early data to determine whether progress on benefit reporting is being made over time and whether variations in state statutes are affecting compliance rates.

138 *See infra* Table A.

139 *See supra* Part IV.C.

140 *Third Party Standard*, *supra* note 18 (listing approximately a dozen possible third-party standard providers).

TABLE A: BENEFIT REPORTING DATA

State	Total	Inactive/Dissolved/Merged	Website	Non-Responsive	Report
California	81	9	56	14	5
Hawaii	4	0	3	1	0
New York	18	2	13	3	3
Virginia	20	12	4	4	0
Total	**123**	**23**	**76**	**22**	**8**

TABLE B: FILING BENEFIT CORPORATION REPORTS

State	File With	Fee
Arizona[141]	Corporation Commission	$10
Arkansas[142]	Secretary of State	$70
District of Columbia[143]	Mayor	Unstated
Massachusetts[144]	State Secretary	$75
Minnesota[145]	Secretary of State	$35
Nebraska[146]	Secretary of State	$25
New Hampshire[147]	Secretary of State	$35
New Jersey[148]	Department of the Treasury	$70
Pennsylvania[149]	Department of State of the Commonwealth	$70
Rhode Island[150]	Secretary of State	$60
South Carolina[151]	Secretary of State	$10
Utah[152]	Division of Corporations	$15

141 ARIZ. REV. STAT. § 10-2442(D) (LexisNexis 2015); ARIZ. CORP. COMM'N, LEGISLATIVE CHANGES EFFECTIVE JANUARY 1, 2015, http://www.azcc.gov/Divisions/Corporations/Legislative-changes-update-Dec-2014.pdf.

142 ARK. CODE ANN. § 4-36-401(e)(3) (2015).

143 D.C. CODE § 29-1304.01(e) (2015).

144 MASS. GEN. LAWS ANN. ch. 156E, § 16(d) (West 2015).

145 MINN. STAT. ANN. § 304A.301(1) (West 2015).

146 NEB. REV. STAT. ANN. § 21-414(4) (LexisNexis 2015), *amended by* 2015 Nebraska laws L.B. 35.

147 N.H. REV. STAT. ANN. § 293-C:13(IV) (2015).

148 N.J. STAT. ANN. § 14A:18-11d.(1) (West 2015).

149 15 PA. STAT. AND CONS. STAT. ANN. § 3331(e) (West 2015).

150 7 R.I. GEN. LAWS § 7-5.3-13(d) (2015) (including both the annual report and benefit report filing under the $60 fee).

151 S.C. CODE ANN. § 33-38-500(E) (2015); STATE OF S.C. SEC'Y OF STATE, ANNUAL BENEFIT REPORT: BENEFIT CORPORATION, http://www.sos.sc.gov/forms/benefit%20corporation/Benefit%20Corporation%20Annual%20Report.pdf.

TABLE C: MODEL LEGISLATION V. DELAWARE FOR BENEFIT REPORTING

Provision	**Model**	**Delaware**
File with State	Yes[153]	No
Available to Shareholders	Yes[154]	Yes[155]
Posted on Website	Required[156]	Optional[157]
Use of Third-Party	Required[158]	Optional[159]
Frequency	Annual[160]	At Least Biennial[161]
Substance	"(a) Contents.–A benefit corporation shall prepare an annual benefit report including all of the following: (1) A narrative description of: (i) The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created. (ii) Both: (A) the ways in which the benefit corporation pursued a specific	"[A] statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. The statement shall include: (1) The objectives the board of directors has established to promote such public benefit or public benefits

[152] UTAH CODE ANN. § 16-10b-402(4) (LexisNexis 2015); *Benefit Corporation*, UTAH DEP'T OF COMMERCE, http://corporations.utah.gov/business/bc.html (last visited Oct. 15, 2015) (under "Frequently Asked Questions," select "How to renew a Benefit Corporation?").

[153] MODEL BENEFIT CORP. LEGIS. §402(d) (2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf.

[154] *Id.* § 402(a). The benefit report must be sent to shareholders on the earlier of "(1) 120 days following the end of the fiscal year of the benefit corporation; or (2) the same time that the benefit corporation delivers any other annual report to its shareholders." *Id.*

[155] DEL. CODE ANN. tit. 8, § 366(b) (2015).

[156] MODEL BENEFIT CORP. LEGIS. § 402(b). Section 402(c) states the following:

> If a benefit corporation does not have an Internet website, the benefit corporation shall provide a copy of its most recent benefit report, without charge, to any person that requests a copy, but the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the copy of the benefit report provided.

Id. § 402(c).

[157] DEL. CODE ANN. tit. 8, § 366(c)(2).

[158] MODEL BENEFIT CORP. LEGIS. § 401(a)(2). The third-party standard must be "comprehensive," "not controlled by the benefit corporation," "credible," and "transparent." *Id.* § 102.

[159] DEL. CODE ANN. tit. 8, § 366(c)(3).

[160] MODEL BENEFIT CORP. LEGIS. § 401(a).

[161] DEL. CODE ANN. tit. 8, § 366(b).

Provision	Model	Delaware
	public benefit that the articles of incorporation state it is the purpose of the benefit corporation to create; and (B) the extent to which that specific public benefit was created. (iii) Any circumstances that have hindered the creation by the benefit corporation of general public benefit or specific public benefit. (iv) The process and rationale for selecting or changing the third-party standard used to prepare the benefit report. (2) An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard: (i) applied consistently with any application of that standard in prior benefit reports; or (ii) accompanied by an explanation of the reasons for: (A) any inconsistent application; or (B) the change to that standard from the one used in the immediately prior report. (3) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed. (4) The compensation paid by the benefit corporation during the year to each director in the capacity of a director. (5) The statement of the benefit director described in section 302(c).	and interests; (2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests; (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and (4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests."[163]

163 DEL. CODE ANN. tit. 8, § 366(b).

Provision	Model	Delaware
	(6) A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of 5% or more of the governance interests in the organization, and the benefit corporation or its directors, officers or any holder of 5% or more of the outstanding shares of the benefit corporation, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard."[162]	

162 MODEL BENEFIT CORP. LEGIS. § 401.

TABLE D: BENEFIT CORPORATIONS REPORTS AND COMPLIANCE

Name/ State	**Third-Party Standard**	**Process + rationale for selecting third-party standard ("3PS") (NY+CA)**	**Ways pursued/ created general/ specific public benefit (NY+CA)**	**Hindered pursuit of general/ specific public benefit (NY+CA)**[164]	**Assessment of overall social performance prepared in accordance with 3PS (NY+CA)**	**5%+ owners of benefit corp. (NY+ CA)**[165]
Nella Terra Cellas, Inc. (CA) 2 pgs.	John Franco	✓	✓	✓	×	×
Patagonia Inc. (CA)[166] 43 pgs.	B Lab (Certified since Dec. 2011)	✓	✓	✓	✓	×
Rimon Law Group (CA) 3 pgs.	B Lab (Certified since June 2009)	✓	✓	✓	✓	✓

[164] In this column (and others), I attempted to be exceedingly generous in my assessment, counting a firm as complying if anything in the report could be reasonably construed as addressing the statutory requirement.

[165] It is possible, though probably unlikely because most benefit corporations are closely-held, that some of the companies had no 5%+ owners. As a practice pointer, benefit corporations with no 5%+ owners should expressly note this fact in their benefit report. It is possible that the benefit corporations consider this to be "proprietary or financial information," which may be omitted from the benefit report as posted online, but if that is the case it should be noted as well.

[166] Patagonia Works is the parent company for benefit corporations Patagonia Inc., Great Pacific Iron Works, Fletcher Chouinard Designs, Inc., and Patagonia Provisions, Inc. *See* PATAGONIA WORKS, ANNUAL BENEFIT CORPORATION REPORT: FISCAL YEAR 2013, at 5 (2013), http://www.patagonia.com/pdf/en_US/bcorp_annual_report_2014.pdf. However, there does not appear to be any statutory provision allowing for the consolidation of benefit reporting by a parent company. Bill Clark, the drafter of the Model Benefit Corporation Legislation, agrees that each benefit corporation, even if a subsidiary, must produce a benefit report. *See* E-mail from Bill Clark to Haskell Murray (July 8, 2015, 6:30 AM) (on file with author) (noting that the model benefit corporation statute, in its current form, requires each benefit corporation to produce its own report).

Name/ State	**Third-Party Standard**	**Process + rationale for selecting third-party standard ("3PS") (NY+CA)**	**Ways pursued/ created general/ specific public benefit (NY+CA)**	**Hindered pursuit of general/ specific public benefit (NY+CA)**[164]	**Assessment of overall social performance prepared in accordance with 3PS (NY+CA)**	**5%+ owners of benefit corp. (NY+ CA)**[165]
Scientific Certif. Sys., Inc. (CA) 50 pgs.	B Lab	✓	✓	×	✓	×[167]
Singularity Educ. Grp. (CA) 2 pgs. & 37 pages[168]	B Lab	✓	✓	✓	✓	✓
Greyston Bakery Inc. (NY) 19 pgs.	B Lab (Certified since June 2008)	✓	✓	✓	✓	×
Singlebrook Tech., Inc. (NY) 11 pgs.	B Lab (Certified since Mar. 2009)	✓	✓	×	✓	×
Turnstile Tours, Inc. (NY) 19 pgs.	B Lab (Certified since Jan. 2015)	✓	✓	✓	✓	✓

[167] The Scientific Certification Systems, Inc. report mentions that ownership remains in the hands of the founders and key company staff (current and past), but does not state which founders or staff hold over five percent of the outstanding stock. *See* SCS GLOBAL SERVS., ANNUAL REPORT 2013, at 11, https://www.scsglobalservices.com/files/resources/scs_annualreport_2013.pdf (last visited Aug. 28, 2015).

[168] Singularity Education Group had a 2-page benefit corporation report and a 37-page impact report. I considered both reports.